June 25, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-17

Ms. Becky A. Klein
Becky Armendariz Klein for U.S. Congress
P.O. Box 1508
Austin, TX 78767-1508

Dear Ms. Klein:

This responds to your letters dated March 29 and April 30, 2004 requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to your part-time paid employment as a consultant with a law firm during the time that you are a Federal candidate.

Background

You state that you are currently a candidate for the U.S. House of Representatives in the 25th Congressional District of Texas. You state that you have resigned from your prior employment as Chairman of the Texas Public Utility Commission, and that you would like to accept part-time employment providing consulting services to a law firm during your candidacy. These consulting services are based upon your prior experience, and would include: 1) helping the law firm identify relevant telecommunication issues addressed by state public utility commissions; 2) implementing the firm's efforts to understand positions of state and federal regulators, and members of the Administration; and 3) providing technical and policy expertise on telecommunication issues, including advising firm clients as appropriate.

You explain that your compensation for this consulting position will be paid on an hourly basis for services actually rendered, and that the rate of compensation will be commensurate with such compensation earned by similarly qualified consultants for similar services. You state that this consulting work for the law firm is for purposes "genuinely independent" of your candidacy. You also state that you will not use the law firm's

facilities for any campaign-related purposes, nor the facilities of any firm client for any campaign-related activity.

Question Presented

Is the compensation from the law firm as a result of your part-time consulting services considered a "contribution" to your campaign under the Act and Commission regulations?

Legal Analysis and Conclusions

No, any payments made to you by the law firm as compensation for consulting services actually rendered are excepted from the definition of "contribution" under the Act because these payments qualify as compensation made "irrespective of [your] candidacy."

The Act prohibits the conversion of campaign funds to any "personal use." 2 U.S.C. 439a. Under the Commission regulations implementing this section of the Act, a third party's payment of a candidate's expenses that would otherwise be deemed "personal use" expenses under Section 439a(b)(2) of the Act is considered a contribution by the third party unless the payment would have been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The regulations specifically state that certain types of employment-related compensation are considered payments made "irrespective of the candidacy:"

> (iii) Payments for that expense were made by the person making the payment before the candidate became a candidate. Payments that are compensation shall be considered contributions unless –
>
> (A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
>
> (B) The compensation is exclusively in consideration of services provided by the employee as a part of this employment; and
>
> (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 CFR 113.1(g)(6)(iii).

If your compensation for consulting services with the law firm satisfies the three criteria in 11 CFR 113.1(g)(6)(iii)(A), (B), and (C), then the payments would not be considered "contributions" to your campaign. This three-part test is based upon Advisory Opinion 1979-74, which you reference in your request. *See* 60 Fed. Reg. 7872 (Feb. 9, 1995). Advisory Opinion 1979-74 was the culmination of a series of Commission advisory opinions reaffirming that "an individual may pursue gainful employment while a candidate for Federal office," and establishing and refining the criteria for when compensation received by a candidate would not be a "contribution" from the employer. *See e.g.* Advisory Opinion 1979-74. In this Advisory Opinion, the Commission applied the three-

part test, now codified at 11 CFR 113.1(g)(6)(iii), to a request from a Federal candidate to receive compensation for lobbying and consulting services from various corporate clients during his candidacy. The candidate's compensation was based exclusively in consideration of consulting services provided by him at a rate equal to that earned by lobbyists performing similar services. Moreover, the candidate would not be using his client's facilities for any campaign related purposes. The Commission decided that the compensation provided under these circumstances was payment made "irrespective of the candidacy" and was, therefore, not a "contribution" under the Act.

The facts presented in your request appear from your representations to be virtually indistinguishable from the situation in Advisory Opinion 1979-74. You represent that your part-time consulting services arrangement is *bona fide* employment genuinely independent of your candidacy, that the hourly compensation proposed is exclusively tied to services actually rendered, and that the rate of compensation will not exceed that paid to similarly qualified consultants who perform similar services. Assuming your representations are correct, the Commission concludes that payments made to you by the law firm, based on these rates as compensation for these consulting services rendered, meet the requirements of 11 CFR 113.1(g)(6)(iii)(A) through (C) and would be payments made "irrespective of the candidacy." Any such payments would not be "contributions" to your campaign under the Act or Commission regulations.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Vice-Chair

Enclosures (AO 1979-74)